

831-833
Nos.

FILED

FEB 11 1946

CHARLES ELMORE DROPLEY
CLERK

IN THE
Supreme Court of the United States
October Term, 1945

GUARANTY TRUST COMPANY OF NEW YORK, Trustee, TRUSTEES OF
UNION COLLEGE IN THE TOWN OF SCHENECTADY, STATE OF
NEW YORK, FRANK BAILEY, MARIE LOUISE BAILEY, MARIE
LOUISE BAILEY and FRANK BAILEY as Trustees, JOHN VANNECK
and PAUL C. MORAN as Trustees and EQUITABLE HOLDING
CORPORATION,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

(And Other Cases as Shown on Page 1.)

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT**

DAVIS POLK WARDWELL
SUNDERLAND & KIENDL,
of Counsel.

THOMAS O'G. FITZGIBBON and
PAUL P. EAGLETON,
For Guaranty Trust Company
of New York, Trustee,
15 Broad Street,
New York 5, N. Y.

HOLTHUSEN & PINKHAM,
of Counsel.

SPENCER PINKHAM,
For Trustees of Union College
in the Town of Schenectady,
State of New York, *et al.*,
5 Maiden Lane,
New York 7, N. Y.



TABLE OF CONTENTS

	PAGE
Petition :	
Statute Involved	3
Opinions Below	3
Jurisdiction	3
Statement	4
Questions Involved	9
Reasons for Granting the Writs	9
 Brief :	
POINT I—The Act does not confer power upon the Commission to force creditors of a solvent public utility holding corporation, which is easily able to pay its debts, to accept anything but cash in payment of such debts	11
POINT II—Even if the Act be construed to confer power upon the Commission to vary the contracts of creditors, the present plan is not fair, equitable, necessary or appropriate	14
POINT III—The debentureholders are entitled to their call premium or the equitable equivalent thereof	17
POINT IV—If the Act be construed as conferring power upon the Commission arbitrarily to strike down the contract rights of creditors, it is unconstitutional	17
Conclusion	19
Appendix A	20
Pertinent Provisions of the Holding Company Act of 1935	
Appendix B	25
Summary of Supplemental Agreement dated as of April 1, 1938	
Appendix C	27
The Opinion and Order of the District Court of December 29, 1945	

TABLE OF CASES

	PAGE
Case v. Los Angeles Lumber Co., 308 U. S. 106	13, 14
Consolidated Rock Products Co. v. Dubois, 312 U. S. 510	13, 15, 16
Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co., 294 U. S. 648 (1935)	18
Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad, 318 U. S. 523 (1943)	15
In re Preble Corporation, 12 F. Supp. 1002 (S. D. Me., 1935, aff'd 84 F. 2nd 73)	12
In re Tennessee Publishing Co., 81 F. 2nd 463 (C. C. A. 6th, 1936)	12
Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 (1935)	18
Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624 (1945)	13, 14, 17, 18
Wright v. Union Central Life Insurance Co., 304 U. S. 502 (1938)	18

COMMISSION REPORTS

In the Matter of Standard Power and Light Corporation and Standard Gas and Electric Company, 9 SEC 862 (1941)	4
---	---

STATUTES

Public Utility Holding Company Act of 1935	2, 4, 20
Fifth Amendment of the Constitution of the United States	3, 9, 12
Section 240(a) of the Judicial Code, as amended, by the Act of February 13, 1925 (28 U. S. C. Section 347)	4

INDEX

iii

	PAGE
Bankruptcy Act	
Section 77	11
Section 77B	11, 12
Chapter X	11, 16

The record is printed pursuant to a stipulation of the parties (R. 219).



IN THE
Supreme Court of the United States

OCTOBER TERM, 1945

**Titles of Cases in Which
This Petition Is Filed**

GUARANTY TRUST COMPANY OF NEW YORK, Trustee, TRUSTEES OF UNION COLLEGE IN THE TOWN OF SCHENECTADY, STATE OF NEW YORK, FRANK BAILEY, MARIE LOUISE BAILEY, MARIE LOUISE BAILEY and FRANK BAILEY as Trustees, JOHN VANNECK and PAUL C. MORAN as Trustees and EQUITABLE HOLDING CORPORATION,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.
[Number 8885 below]

SAME

v.

STANDARD GAS AND ELECTRIC COMPANY and SECURITIES AND EXCHANGE COMMISSION,
Respondents.
[Number 8906 below]

SAME

v.

STANDARD GAS AND ELECTRIC COMPANY,
Respondent.
[Number 8934 below]

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT**

The petitioners are Guaranty Trust Company of New York, Trustee, Trustees of Union College in the Town of Schenectady, State of New York; Frank Bailey, Marie Louise Bailey, Marie Louise Bailey and Frank Bailey as Trustees, John Vanneck and Paul C. Moran as Trustees, and Equitable Holding Corporation. They pray that writs of certiorari issue to review the three judgments of the United States Circuit Court of Appeals for the Third Circuit, entered on September 14, 1945. Two of these, Nos. 8885 and 8934, reversed the order of the United States District Court for the District of Delaware disapproving the Section 11(e) plan, as amended, of Standard Gas and Electric Company under Section 11(e) of the Public Utility Holding Company Act of 1935 as not fair and equitable to debentureholders, and the third, No. 8906, affirmed the order of the District Court holding that the holders of debentures issued or assumed by Standard Gas and Electric Company are not entitled to contract redemption premiums.

Guaranty Trust Company of New York is Trustee under certain indenture agreements under which approximately \$39,000,000 of notes and debentures were issued and are now outstanding. Petitioners, Union College, *et al.*, are the owners of \$513,000 of notes and debentures of Standard Gas and Electric Company. They hold some of each issue outstanding, including the issues in respect of which Guaranty Trust Company is not Trustee.

The questions here are of general concern in the administration of the Public Utility Holding Company Act of 1935, touching (i) the relative treatment of senior creditors of the Company as against the treatment of the present stockholders who are to become the common stockholders of the recapitalized Company; (ii)) the power of

the Securities and Exchange Commission and the enforcement court to force creditors of a solvent company to accept speculative common stocks at appraised values in payment or partial payment of debt; (iii) whether in a Section 11(e) plan under the Act the holders of notes and debentures who have a contract right under the indentures to receive either (a) interest to maturity, or (b) a call premium, are entitled to compensation on account of such rights; and (iv) whether Section 11 violates the Fifth Amendment or is given an unconstitutional application by the Securities and Exchange Commission.

The Statute Involved

The pertinent provisions of Section 11 of the Public Utility Holding Company Act of 1935 (15 U. S. C. A. Sec. 79 k *et seq.*) are set forth in the annexed Appendix A.

Opinions Below

The Opinion of the Circuit Court of Appeals (R. 203) is reported in 151 F. 2d 326.

The Opinion of the District Court (R. 129a) is reported in 59 F. Supp. 274.

The opinions of the Securities and Exchange Commission are reported in SEC , Holding Company Act Release No. 5430 (R. 3a) and SEC , Holding Company Act Release No. 5070 (R. 29a).

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on September 14, 1945. By orders entered herein the time within which petitions for writs of certiorari might be filed was extended to and including February 11, 1945 (R. 221, 222).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Section 347).

Statement

Standard Gas and Electric Company (herein called "Standard") is a registered holding company under the Public Utility Holding Company Act of 1935 (herein called the "Act"). In 1941 the Securities and Exchange Commission (herein called the "Commission") entered an order directing Standard to divest itself of all of its holdings except its interest in the Philadelphia Company.* Standard is under no order of dissolution and no proceedings are pending to procure its dissolution.

Standard has outstanding approximately \$59,000,000 of notes and debentures, three classes of preferred and one class of common stock. The notes and debentures held by some 19,600 holders (R. 184) are virtually the only debts of Standard.

On March 24, 1943, Standard filed with the Commission an application for the approval of a plan under Section 11(e) of the Act. This plan was rejected by the Commission (R. 3a) and Standard filed the plan now before this Court on August 29, 1944, and filed amendments to it on September 11 and November 6, 1944 (herein called the "Plan"). Under the Plan Standard proposes to retire all of the notes and debentures by the payment (as to each \$1,000 note or debenture) of \$304.95 in cash and the distribution of common stocks of five subsidiary operating companies valued in the Plan at \$690, subject to a limited adjustment specified in the Plan. The adjustment, made under a formula restricted as to amount and time (R. 36a)

* *In the Matter of Standard Power and Light Corporation and Standard Gas and Electric Company*, 9 SEC 862 (1941).

added \$5.05 to the assigned value of \$690.00.* Valuation hearings on the first plan and on the Plan were conducted before an examiner of the Commission for about thirty-five days.

Standard is thoroughly solvent and able to pay its debts. Its assets exceed its liabilities by at least 2 to 1 (R. 129a). The notes and debentures are entitled to the benefits of "negative pledge" clauses (Appendix B) which in general terms preclude Standard from disposing of assets unless the proceeds are used to liquidate notes and debentures or reinvested in other capital assets.

Although the notes and debentures have a call upon all of the assets of Standard until they are paid in full and in cash, nevertheless, the stocks to be delivered under the Plan constitute less than 35% of the assets of Standard and would be delivered in payment of 70% of the debt to the debentureholders; the stocks and cash together constitute less than 50% of the assets of Standard and would be delivered in full payment of the entire debt of the debentureholders (R. 31a, *et seq.*). The earnings available for dividends on the stocks to be delivered constitute approximately 40% of the earnings available upon the total

Company	Number of Shares to be Distributed	Assigned Basic Value Per Share	Aggregate Basic Value
Oklahoma Gas and Electric Co.	12	\$21	\$252
Wisconsin Public Service Corp.	18	10	180
California Oregon Power Co.	5	24	120
Pacific Gas and Electric Co...	3	32	96
Mountain States Power Co. . .	2	21	42
Total aggregate basic value for shares to be distributed for each \$1,000 principal amount of Notes or Debentures			\$ 690.00
Add: Adjustment to date of Commission Opinion. .			5.05
Cash Payment			304.95
Total			<u>\$1,000.00</u>

assets of Standard (R. 31a, *et seq.*). It appears without contradiction in the record (R. 171a) that the very stocks to be delivered could themselves be underwritten and sold on the open market at prices "overall" better than the aggregate amounts at which they are valued in the Plan.

Accordingly, there is no question but that the notes and debentures could be paid in full and in cash without hardships or injury to anyone.

On the other hand, it appears that in order to convert the "package" of stocks into cash, under certain conditions the cost of so converting a \$500 debenture would be as much as 7.4% of the principal amount (R. 169a). It further appears that debentureholders would be selling the stocks in an unsponsored market where they might or might not obtain the values assigned in the Plan (R. 169a). All of the stocks to be distributed under the Plan could be sold to underwriters by Standard at an expense not to exceed \$2,700,000, which, in the aggregate, is an amount somewhat less than the possible aggregate cost to the debentureholders of converting the stocks into cash (R. 170a).

On March 2, 1945, upon application by the Commission for an enforcement order, the District Court filed an opinion in which it refused to enforce the Plan. It held (R. 129-150a) (a) that the notes and debentures were debts; (b) that creditors are essentially different from stockholders, having a right to be paid in dollars and having no aliquot interest in the corporate assets; (c) that the Act contains no language conferring power upon the Commission to vary the contracts of creditors where such contracts can be carried out; (d) that, in the absence of such specific statutory authority creditors, vested with an absolute priority, are entitled to cash, not speculative common stocks, and (e) that, even if the Act did confer bare power under proper circumstances, it is not fair, equitable,

necessary or appropriate to force creditors of a corporation, which can easily pay them in cash, to accept common stocks which may be worth far less or far more than the amount of their debt when received by them.

The District Court also held (R. 139a, 149a) that the debentureholders were entitled to receive only the face of their notes and debentures and not the call premiums.

Upon appeal by the Commission and Standard from refusal of the District Court to enter an enforcement order, and by petitioners here and one other from its holding in respect of the call premium, the Circuit Court of Appeals for the Third Circuit unanimously reversed (R. 203) the District Court and, thereby, the appellate court held (a) that the Act is a reorganization statute and the power in the Commission to adopt any form of plan, within the perimeter of equity and fairness, should be implied and (b) that the debentures are merely another type of corporate security essentially the same as a preferred stock, that they were not matured by impact of the Act and therefore, under the authority of *Otis & Co. v. Securities and Exchange Commission*, 323 U. S. 624 (1945), it is fair and equitable to force the holders thereof to accept the stocks in partial substitution therefor. It affirmed as to the call premiums (R. 213).

***Proceedings in the District Court
Subsequent to the Mandates.***

Mandates to the District Court issued on October 2, 1945. Two months later, on December 3, 1945, Standard filed a motion in the District Court to dismiss the pending application of the Commission filed November 18, 1944 to enforce the Plan. The purpose of the motion was to withdraw the Plan so that Standard could seek approval from the Commission to borrow money which, with cash funds available to Standard, would be sufficient to call for redemption all of the notes and debentures. This action was taken because, as Standard stated, it believed the stocks to be

delivered had on December 3, 1945 so increased in value that it was unfair to its stockholders to enforce the Plan. The Commission agreed that Standard has a unilateral prerogative i.e. a right to call the notes and debentures for payment in cash, and, accordingly, interposed no opposition to the motion. The District Court on December 29, 1945, Appendix C, p. 37, remanded the matters concerning the redemption to the Commission, although that Court retained jurisdiction of the Plan.

Certain debentureholders objected to the order of the District Court remanding this phase of the Plan to the Commission and have appealed from its order on the ground, among others, that the prior mandates of the Circuit Court precludes any action by the District Court except enforcement of the Plan. The order of the District Court provided that if the notes and debentures were not called within thirty days from its date, or such further time as the Commission might grant, the Commission might renew its application for enforcement of the original Plan.* It is now unknown what further action will be taken by Standard to redeem the notes and debentures. It may be argued by the Commission or Standard, or both, that this petition is moot. Unless Standard calls the notes and debentures for redemption and makes irrevocable provision for their payment within the time limited by the District Court, as extended by the Commission, it is, at the very least, possible that the Plan may be enforced against the debentureholders.

In the event that Standard calls the notes and debentures for redemption and makes irrevocable provision for their payment the petitioners will immediately inform this Court thereof and take such action as may be proper to terminate proceedings herein.

* The Commission on January 28, 1946, granted Standard an additional twenty days extension of time within which to comply with the order of the District Court (*Holding Company Act Release No. 6385*).

Questions Involved

1. Does the Act, which does not expressly so provide, impliedly confer upon the Commission the power to affect the rights of senior creditors of a company which is solvent, both in the bankruptcy and the equity sense, by forcing such creditors without their consent to accept distribution to them of speculative common stocks at appraised values in satisfaction of a part of their debt?

2. Is a voluntary plan under Section 11(e) of the Public Utility Holding Company Act fair and equitable where the holders of notes and debentures, being the only creditors of a solvent company, are required to accept speculative common stocks in satisfaction of a major part of the debt without compensation for their loss of seniority of position and other investment rights?

3. In a Section 11(e) plan is a contract right of the holders of notes and debentures to receive either (i) interest to maturity, or (ii) a call premium, a valuable right for which they are entitled to compensation where the debtor company is under no order to dissolve?

4. Does Section 11 violate the Fifth Amendment or is it given an unconstitutional application by the Commission?

Reasons for Granting Writs

The administration of the Act affects substantially the entire public utility industry. Petitioners believe the foregoing questions to be of far reaching national importance. Decision of them may be expected to affect the form and substance of many plans relating to other public utility holding companies. This case presents the first instance in which the Commission approved satisfaction of indebtedness of a solvent public utility holding company by payment in other securities rather than in cash (R. 131a).

The Circuit Court has in effect held that the words "fair and equitable" in the Act have a meaning different from that which has been accorded them by this Court in equity and bankruptcy reorganizations; that the strict priority rule does not apply; and that the rights of creditors of a solvent registered public utility holding company are less than the rights of creditors of an insolvent company being reorganized in equity or under the Chandler Act. The Circuit Court has also sustained the finding of the Commission that, under the Act, senior creditors need not be compensated for change of status. The decision appealed from also determines that a construction of the Act so as to vest virtually unrestricted and arbitrary power in the Commission to affect the contract rights of creditors as approved in the Plan is constitutional.

We respectfully submit that this Court should determine whether these holdings by the Circuit Court of Appeals are correct.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review a full and complete transcript and record of all proceedings in the matters there numbered 8885, 8906 and 8934 and that each of the judgments and the mandate of such Circuit Court be reversed, and that your petitioners may have such other and further relief as may be just and proper.

DAVIS POLK WARDWELL
SUNDERLAND & KIENDL,

HOLTHUSEN & PINKHAM,
Of Counsel.

THOMAS O'G. FITZGIBBON,
PAUL P. EAGLETON,
Attorneys for petitioner,
Guaranty Trust Company
of New York, Trustee

SPENCER PINKHAM,
Attorney for petitioners,
Union College, *et al.*

